

without any evidence in support of the exceptions founded upon the alleged inequality of the partition in point of value, or that the land was divided into too many parcels, and I am, therefore, of opinion, for the reasons stated in the remarks of this court in May last, that the exceptions of this character are untenable, and must be overruled.

A good deal has been said in this case upon the subject of the right of election given to the eldest son by the act of 1820, ch. 191, and the case of *Chaney and wife vs. Tipton*, 11 G. & J., 253, has been cited to show that it is a valuable right secured to certain heirs by the act referred to, which becomes vested by the death of the intestate, and which may pass to a grantee. It is true it is a valuable right, but it is equally true that it is a right which has no existence, and which cannot be enforced unless the commissioners appointed to make the partition shall determine that the estate cannot be divided without loss and injury to all the parties. It is only upon their making a return of their judgment to that effect, and upon the confirmation by the court of this return that the right of election as prescribed by the statute can be executed. If the commissioners return, that the land may be divided, and this return is approved of, the right of election has no existence. In this case, the commissioners have made such a return, and there being no evidence impeaching their judgment or conduct in any respect, the right of election under the act of Assembly has no existence.

The commissioners by their last return have made a division of the dower land, and have given out of it to each of the infant heirs for whom no provision, *in presenti*, was made by their first return a share equal to a child's part, and to the widow the residue thereof in fee simple. There is no proof showing the inequality of this partition, though two exceptions charge such inequality, and an opportunity was given the exceptants to introduce their proof. It must be assumed, therefore, that the judgment of the commissioners in this respect is correct, and the fact as they have stated in their return.

The assignment of this parcel of land to the widow in fee simple is urged as an objection, and I think it is a good one.